

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF LISA COX, by SUSAN COX as
Personal Representative,

UNPUBLISHED
May 10, 2012

Plaintiff-Appellee,

v

No. 303158
Wayne Circuit Court
LC No. 10-000095-NO

TARA MCMAHON, MIKE BARTUS, SARAH
CZARNECKI, ZACHARY HOLLIS, JOSHUA
GRAY, SAMANTHA PALAMANA, CANDICE
MINK, NICOLE GAYNIER, JOSHUA
FRANKLIN, JOHN MAIER,

Defendants-Appellants,

and

HURON-CLINTON METROPOLITAN
AUTHORITY,

Defendant.

Before: K.F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

PER CURIAM.

The individual defendants appeal as of right the trial court's order denying their motion for summary disposition. We reverse and remand.

I. BASIC FACTS

On June 27, 2009, Lisa Cox and her friend, Derek Debus, visited the wave pool¹ located at the Lake Erie Metropark.² The two of them were sharing a raft in the deep end of the pool

¹ A wave pool is a pool where waves are created. At this park, the waves are programmed to operate on a 10-minute "on"/10-minute "off" cycle.

² Lake Erie Metropark is part of the Huron-Clinton Metroparks.

when Lisa told Debus that she felt nauseous and wanted to leave the pool. Debus grabbed the front edge of the raft and started swimming toward the closest ladder exit of the pool, with Lisa swimming and holding onto the rear edge. Before reaching the ladder, they were struck by a wave and became separated. Debus managed to grab the ladder and pull himself out. Once out, he looked for Lisa for “a few moments” but did not see her anywhere. Debus walked back to where the two of them set their towels, which he said was located approximately 200 to 250 yards away. After not seeing Lisa at their site, Debus walked back towards the pool. At the pool, the waves were still “on,” and Debus walked into the pool, halfway to the deep area, when he thought he saw someone resembling Lisa walking towards their towels. Debus then turned around and returned to the towels again only to see that Lisa was not there. Debus then started heading back towards the pool. At around this time, the waves turned “off.”

Joshua Schmidt was in the deep end of the pool with his son. Shortly after the waves turned off, his son noticed something on the bottom of the pool and asked, “Daddy, what is that down there?” Schmidt looked down and noticed that it was a woman (later identified as Lisa). Schmidt then made eye contact with the lifeguard nearby, Tara McMahon, and yelled, “There’s a girl down there!” Without waiting for a response, Schmidt dove down to pull Lisa up. Two other patrons, Todd Myers and Ryan Jennings, also had noticed Lisa at this time and also dove down to help pull Lisa up.

McMahon testified that when Schmidt told her that there was “a girl down there,” she looked down but did not see anything.³ The first time McMahon saw Lisa was when the men pulled Lisa to the surface. At this point, McMahon blew her whistle three times to initiate the pool’s emergency protocol. The men at first tried to take Lisa to the nearby edge, but McMahon instructed them to head towards the shallow end instead. McMahon then made a “waveless entry”⁴ and assisted transporting Lisa.

Lifeguard Mike Bartus was in the lifeguard chair on McMahon’s side of the pool but in the shallow end. He had no indication that anything was wrong until he heard the three whistle blasts. After hearing the whistles, Bartus made a waveless entry, and by the time he got to Lisa, he saw that McMahon already had Lisa in an “inline stabilization” position,⁵ so he grabbed Lisa’s thigh and leg area to support her, while helping to transport Lisa out of the pool.

Lifeguard Samantha Palamara was sitting in the lifeguard chair in the shallow end opposite Bartus. After hearing the whistles, she ran to get the backboard, but it was already

³ Also of note, the pool has four coverage zones, with one lifeguard on a raised chair assigned to each zone to monitor. The zones do overlap with adjacent zones, however, so those overlap areas have two lifeguards monitoring. But McMahon testified that Schmidt was located entirely within her zone.

⁴ A waveless entry is one where a rescuer enters the body of water without creating any waves that might be detrimental to the victim.

⁵ An inline stabilization position involves the rescuer holding the victim’s arms above the victim’s head.

gone. So she performed crowd control to keep the area clear so the rescuers had room to work and EMS had a path.

Lifeguard Joshua Gray was in the chair in the deep end opposite McMahon (and next to Palamara). When he heard the whistles, he looked and saw Lisa supported by a man. Gray testified that he saw Lisa seizing in the water for approximately 10 to 30 seconds. He saw McMahon and Bartus in the water and stood in his chair the entire time because policy requires that one lifeguard remain in one of the chairs at all times monitoring the entire pool, even during an emergency.

Lifeguards Zachary Hollis and Michelangelo⁶ were assigned to monitor the bath houses when they heard the three emergency whistles. Hollis testified that when the emergency whistles are blown, one lifeguard from the bathhouse is to get the backboard and the other lifeguard at the bathhouse is to get the keys to open the gates so EMS can enter the area. Hollis retrieved the backboard and headed to the pool. He was not sure what Michelangelo did.

Lifeguard Candice Mink was assigned to walk the pool deck at this time. She was in the process of scraping up some gum from the deck when she heard the whistles. She then ran to the pool edge and saw people carrying Lisa. Mink then entered the water and assisted. She testified that she swam while moving Lisa until she could walk in the shallow end.

Josh Franklin was one of the two assistant managers.⁷ He was walking to the food bar with lifeguard Sarah Czarnecki when they both heard the three whistle blasts. They both then ran immediately back. Franklin ran to the pool, and Czarnecki ran to the first-aid room to grab various equipment, including the first-aid bag and the AED. Czarnecki then went to the pool area and laid the equipment out, setting up the rescue site.

Nichole Gaynier, the other assistant manager, was in the lifeguard office when she heard the three whistle blasts. She then ran out of the office and told other lifeguards to get the “equipment,” which included first aid kit, AED, oxygen, and a backboard. Gaynier entered the water and met the other lifeguards with Lisa.

When Hollis arrived in the pool with the backboard, he saw Bartus and McMahon with Lisa. The guards in the pool then placed Lisa on the backboard and carried her out of the water and laid her down on the concrete. All of the guards near Lisa noted that she was foaming profusely at the mouth. Nichole testified that she attempted to assess Lisa’s condition while they were moving her but was unable to get proper placement on Lisa with the movement.

As to events occurring after Lisa was set on the concrete, the testimony was conflicted. Plaintiff’s witnesses described a chaotic and hectic scene where lifeguards ran around not knowing what to do, which resulted in Lisa lying for anywhere from 5 up to 12 minutes before

⁶ The record does not reflect any other name for this person.

⁷ The head manager, Blake Bannon, was not working this day. But both assistant managers, Josh Franklin and Nichole Gaynier, were.

any CPR was started. Conversely, the lifeguards all testified that while certain lifeguards were running and grabbing equipment, CPR was started almost immediately.

Schmidt testified that no CPR was started right away because the lifeguards were “running around” looking for two things: (1) a mouthpiece and (2) purple gloves. He specified that no one was even touching Lisa during this time, which lasted over five minutes.

Jennings testified that the lifeguards were running around screaming for a mouthpiece and did not start CPR for five minutes after Lisa was placed on the concrete.

Laura Nasser was a patron at the wave pool and testified that the lifeguards were running “in fear” looking for a mouthpiece and a mask. Nasser also stated that after 15 to 20 minutes went by without anyone performing CPR, she called 9-1-1 herself. Nasser also acknowledged that this time estimate was different from the estimate she gave the day of the incident when she stated that it took 10 minutes.

Schmidt’s wife, Jennifer, and Jennings’s brother, Joseph, also testified that CPR was not started until at least five minutes elapsed since Lisa was placed on the concrete. Joseph’s testimony was contradictory though. He initially stated that the two lifeguards who got Lisa out of the pool were “doing CPR right when they got out. And then there was another lifeguard that was going back and forth to get whatever they needed.” Specifically, Joseph clarified that they were only doing chest compressions at first. However, when Joseph was confronted with a prior statement he made that said five minutes had elapsed before CPR was started, he agreed with that assessment.

As noted earlier, the lifeguards had an entirely different view of the events. The guards testified that the managers, Franklin and Gaynier, assumed control of the situation with Franklin giving most of the instructions.

Upon noticing that Lisa was foaming from the mouth, Franklin told Bartus to retrieve the suction pump. Bartus ran to the first-aid room but could not locate the suction pump. He admitted that he did not recall ever seeing one before and also did not recall being instructed where it was located. Just “a couple seconds later,” Franklin entered the first-aid room and grabbed the suction pump himself. Bartus then went on crowd control duty and saw Franklin and Gaynier alternating giving chest compressions to Lisa while Czarnecki administered giving breaths with a facemask.

After bringing the backboard and helping to get Lisa to the concrete, and without being told to, Hollis ran to the closest lifeguard chair and grabbed a CPR mask that was there.⁸ However, upon returning with the mask, Hollis noticed that the equipment was already with the

⁸ A mask was located at each lifeguard chair.

lifeguards tending to Lisa,⁹ so he simply dropped the mask near them and proceeded to work crowd control. Hollis did not see any “confusion” from the lifeguards.

After Lisa was placed on the concrete, Czarnecki noticed that Lisa’s airway was blocked as a result of the foaming from Lisa’s mouth and nose. While waiting for the suction pump to arrive, she helped set Lisa on her side, in the HAINES¹⁰ position, to help keep the foam from going down Lisa’s throat. When the suction pump arrived, Lisa’s mouth was suctioned for a few seconds. Czarnecki also testified that no CPR was started until the suctioning was done.

When CPR did start, it was Czarnecki providing the breaths and Gaynier and Franklin alternating on the chest compressions. During this time, Officer John Maier arrived at the scene. He was at the police station near the park entrance when a dispatcher came into the room and said that someone was being “backboarded” at the pool. Maier told the dispatcher to call for an ambulance and then drove to the pool. Maier said it only took a minute or two to make the one-quarter or one-half mile drive to the pool. He said that when he arrived at the scene, he saw three lifeguards giving CPR: Franklin and Gaynier were giving compressions and Czarnecki was giving breaths with a mask. He also noted that there was a lot of foaming from Lisa’s mouth, which required suctioning during the compressions. He saw the AED there and grabbed it, opened it, and hooked it up. Franklin applied the pads to Lisa. Maier said he followed the audio instructions from the AED and in total pressed the shock button twice.

EMS eventually arrived. There were varying accounts of how long it took for them to arrive. Some estimates were as short as a few minutes up to 20 minutes.

Lisa was pronounced dead at the hospital. A medical examiner’s report stated that the cause of death was drowning brought on by seizures. The report also acknowledged that the seizure part of its conclusion was based on other reports and observations instead of anything the medical examiner found during her examination.

On January 5, 2010, plaintiff filed this wrongful death action based on negligence/gross negligence against the individual defendants and the Huron-Clinton Metropolitan Authority (“HCMA”). After the conclusion of discovery, all of the defendants moved for summary disposition, claiming governmental immunity. HCMA argued that it, as a municipal corporation, was immune from tort liability because it was engaged in the exercise or discharge of a governmental function. The individual defendants argued that their conduct could not be considered gross negligence and that any negligence could not be “the” proximate cause of Lisa’s death. Plaintiff opposed the motion, focusing on its position that the individual defendants were grossly negligent and that a reasonable juror could find that the negligence was the proximate cause of Lisa’s death. The trial court granted the motion with respect to defendant

⁹ Bartus explained that a CPR mask is also contained in the first-aid bag.

¹⁰ HAINES stands for “High Arm IN Endangered Spine.” CardioCare, Recovery Position <<http://cardiocarecpr.com/cprblshaines.html>> (accessed May 3, 2012).

HCMA but denied it with respect to the individual defendants. The individual defendants appealed to this Court.

II. ANALYSIS

The individual defendants argue that the trial court erred when it denied their motion for summary disposition under MCR 2.116(C)(7). We agree.

We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) de novo. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). Summary disposition is appropriate under MCR 2.116(C)(7) if a claim is barred because of an immunity granted by law. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). A motion pursuant to MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence so long as the substance of the evidence is admissible. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "The allegations set forth in the complaint must be accepted as true unless contradicted by other evidence." *Estate of Bradley v Kent Co Sheriff's Dep't*, ___ Mich App ___, ___ NW2d ___ (Docket No. 299640, issued March 22, 2012), slip op, p 3.

"An employee of a governmental agency acting within the scope of his or her authority is immune from tort liability unless the employee's conduct amounts to gross negligence that is the proximate cause of the injury." *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006), citing MCL 691.1407(2). "Gross negligence" is defined by MCL 691.1407(7)(a) as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Thus, "[s]ummary disposition is precluded where reasonable jurors honestly could have reached different conclusions with respect to whether a defendant's conduct amounted to gross negligence." *Id.* (quotations omitted). "Evidence of ordinary negligence is not enough to establish a material question of fact regarding whether a government employee was grossly negligent." *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 265; 792 NW2d 781 (2010).

There is no dispute that the individual defendants were all governmental employees. Thus, in order for them to be liable, plaintiff must present sufficient evidence such that a reasonable juror could conclude that they were grossly negligent. Plaintiff failed to do so.

Because plaintiff alleged three specific instances of gross negligence, we will analyze these instances separately. The first instance involved the four lifeguards that were sitting in the chairs when Lisa went under the water (McMahon, Bartus, Gray, and Palamara). The second instance took place immediately after Lisa was removed from the pool and involved all of the lifeguards. Finally, the last instance involved those who were tending to Lisa when the AED was being utilized (Officer Maier, Franklin, Gaynier, and Czarnecki).

A. GROUP #1 – LIFEGUARDS IN CHAIRS

Plaintiff argued at the trial court that the people in this first group were grossly negligent when they individually failed to observe Lisa at the bottom of the pool, failed to respond to the patrons' cries for help, and failed to assist in getting Lisa out of the pool. However, there was no evidence that any of these "failures" were grossly negligent.

McMahon testified that she was scanning her area of the pool and simply did not see anyone at the bottom of the pool. In fact, even after Schmidt told McMahon that there was a girl “down there,” McMahon looked down and still did not see anyone. McMahon’s failure to see Lisa when she looked cannot be construed as reckless conduct that demonstrated a substantial lack of concern. Likewise, the guards in the other chairs were not even responsible for monitoring the area where Lisa was found. Thus, their failure to see Lisa also cannot be viewed as negligent, let alone grossly negligent.

Also, the lifeguards’ alleged failure to “react” to the patrons’ cries for assistance was not grossly negligent. First, the only lifeguard that was spoken to was McMahon. McMahon did not just ignore the request or show indifference to it—instead, she actively looked for the “girl down there” and only saw her when the rescuers had already pulled Lisa to the surface. Thus, this behavior did not constitute gross negligence.

Finally, the lifeguards were not grossly negligent when they allegedly failed to help get Lisa out of the deep end of the pool. While the evidence shows that Lisa was initially pulled up from the bottom of the pool by three patrons and those three men then pulled Lisa out of the deep end, there was no evidence that the lifeguards were negligent. It is undisputed that those three men were the first to see Lisa. No other lifeguard saw Lisa until she was brought to the surface. Thus, the fact that the men acted first does not mean that the lifeguards were grossly negligent. After the men initially tried to take Lisa to the ladder at the side of the deep end, McMahon told the men that they had to go towards the shallow end. McMahon then made a waveless entry into the pool in order to help get Lisa out of the pool. Again, this behavior by McMahon does not exhibit reckless or indifferent conduct. In fact, it shows a concerted and reasonable effort to help.

B. GROUP #2 – ALL THE LIFEGUARDS

Plaintiff also argued at the trial court that all of the lifeguard defendants failed to administer CPR in a timely manner because of (1) lack of an experienced supervisor, (2) lack of equipment available, (3) panic and lack of experience, and (4) improper basic life support technique. Specifically, plaintiff argued that CPR was not started for 5 to 10 minutes after Lisa was pulled from the pool and placed on the deck. We find that the allegations, even if true, cannot constitute gross negligence.

The thrust of plaintiff’s position is that CPR should have started immediately once Lisa was pulled from the pool, but it started many minutes later. Plaintiff relies on the testimony from several eyewitnesses that all stated that Lisa was lying on the ground for at least five minutes before CPR was started. However, these witnesses also stated that the lifeguards were all “running around” as if not knowing what to do or where to find equipment before starting CPR. Jennifer Schmidt explained that everyone was “running around frantically” looking for gloves, a mouthpiece, and an AED. Laura Nasser explained that some lifeguards were keeping the area clear, while others were running back and forth and others called for a “mouthpiece” and a “mask.” Jennings also saw lifeguards running around, while someone yelled for a “mouthpiece.” Joshua Schmidt testified that no one performed CPR for at least five minutes while lifeguards ran around searching for a mouthpiece and gloves.

There is no dispute, however, that CPR was started at some point. In the view of the eyewitnesses and plaintiff's expert, it should have been started sooner. But while this time elapsed, the witnesses described a chaotic situation with everyone running around trying to get the equipment the lifeguards thought they needed before starting CPR and lifesaving procedures. Even looking at this evidence in a light most favorable to plaintiff, this behavior does not exhibit conduct so reckless as to demonstrate a substantial lack of concern for whether an injury resulted. Indeed, the allegations that the lifeguards *were* "running around"—even frantically—demonstrates conduct that exhibits concern, instead of a lack of concern, for Lisa. At best, the above would be evidence of ordinary negligence. But such evidence is inadequate to support a claim of gross negligence. *Chelsea Inv Group*, 288 Mich App at 265.

C. GROUP #3 – OFFICER MAIER AND TENDING LIFEGUARDS

Plaintiff also argued at the trial court that Maier and the tending lifeguards (Franklin, Gaynier, and Cznarecki) were grossly negligent with their use of the AED. Jennifer claimed in her sworn statement that while Maier was present, the AED machine was instructing the people to provide chest compressions, but the people surrounding Lisa did not do so until "the last three times" the machine requested the compressions. In short, plaintiff's position is that since the tending people did not immediately follow the instructions given by the AED, they were grossly negligent. We disagree. We note that Jennifer also stated that the people were "waiting for stuff to arrive" before starting CPR. As noted above, waiting for equipment that they considered necessary cannot be considered conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

D. CONCLUSION

In sum, plaintiff failed to establish that any defendant acted grossly negligently. As a result, we need not address defendants' arguments related to proximate cause. Thus, on remand, the trial court is to grant defendants' motion for summary disposition under MCR 2.116(C)(7).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendants, the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Mark T. Boonstra